WISCONSIN STATE SENATOR
DAVE HANSEN
SENATOR – 30TH DISTRICT
ASSISTANT MAJORITY LEADER

Equal Pay Enforcement Act
Senate Bill 20
Committee Testimony
Senate Committee on Committee on Labor, Elections and Urban Affair
3-12-09

Thank you Chairman Coggs and members of the committee. I am here today to testify in favor of Senate Bill 20, The Equal Pay Enforcement Act.

Representative Sinicki and I have been working together on this issue for a number of sessions now and during that time little has changed to suggest anything but that it is time to take action to resolve the unfair differences in pay that exist between men and women who are employed performing the same job.

Senate Bill 20 sends an important message about the value that we, as a society, place on the efforts of individual workers. People deserve to be fairly compensated for putting in a hard day's work.

As a husband and father of three grown daughters, I am disappointed that we are here talking about the wage gap that exists between men and women both in our nation and in Wisconsin. I don't understand how, after 45 years of federal law and nearly 60 years in state law, that there is still such a disparity in pay for doing the same work.

I want my daughters and my grandchildren—grandsons and granddaughters alike—to be able to achieve their American Dream equally. And for them to be rewarded on their merits and ability.

We spend our lives as parents telling our children that if they work hard, do well in school and apply themselves that there are no limits to what they can accomplish. It is way past time that we took action to keep that promise.

This legislation is about more than just pay equity. It's about lifting children out of poverty and strengthening families.

It's about improving the quality of life across the board for Wisconsin families from Marinette to Milwaukee and Oshkosh to Onalaska as well as growing our economy and creating jobs from the ground up; If low and middle

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State Capitol
P.O. Box 7882
Madison, Wisconsin 53707-7882
Phone: (608) 266-5670
Toll-Free: 1-866-221-9395
Fax: (608) 267-6791
E-mail: sen.hansen@legis.wisconsin.gov

income workers and their families have more money to spend, the more local goods and services they will purchase and the more jobs will be created.

As a result of the unequal treatment when it comes to compensating men and women in the workplace, Wisconsin families lose more than ***$4,000*** per year due to unequal pay.

This is money that will go to working families who will spend it in our economy creating more demand for goods and services that will in turn create more jobs.

But, just as important, like increasing the minimum wage, The Equal Pay Enforcement Act sends an important message about the value that we, as a society, place on the efforts of individual workers. People deserve to be fairly compensated for putting in a hard day's work.

If you work, you and your family should not have to depend on government assistance and the charity of others to put food on your table and a roof over your children's head. It is long past time that we do more than talk about the value of work.

We can do more. Passing this legislation would be a great start. It's not a new idea, and Wisconsin is not alone in trying to solve the problem. Similar legislation has been introduced in 25 other states and at the federal level as well.

For many years Wisconsin was considered a leader on policies that protected and strengthened working families. It is time for us to do the right thing and pass the Equal Pay Enforcement Act. Thank you Mister Chairman and members. I'd be happy to answer any questions.

Testimony of Rep. Christine Sinicki before the Senate Labor Committee (Assembly Author of Senate Bill 20, 2009 Legislative Session)

March 12, 2009

Good morning Chairman Coggs and Committee members.

I couldn't be happier to be here today.

We meet today as Legislators who can expect to finally help the economic security of our state's workers and families in a concrete way.

That's a good thing in times when big business can expect a bail-out, but the hard-working citizens of our state cannot.

And, for that reason, Senator Hansen and I look forward to finally passing this bill through both houses.

Even though it is often called the Equal Pay bill, it will give all Wisconsin workers more confidence to say to employers: you have nothing to worry about from me as long as you treat me fairly.

This bill would increase penalties for pay discrimination. It will do the same for discrimination against workers in hiring, terminations, or other conditions of work, like benefits.

The bill will help all workers who are already protected under Wisconsin's Fair Employment Law to fight these kinds of discrimination.

The bill does not create any new protected groups, just backs up those who, despite current law, are still unfairly denied work, fired from work, or compensated less than others for the same work.

The solution for employers is simple: treat workers equally for the same work, no matter what their age, gender, race, or beliefs. This is not a complicated formula.

Employers who discriminate do it because they can get away with it. It's time for that to stop.

Members of the Senate Labor Committee, thank you for voting one more time in favor of the workers who keep our state moving forward.

Wisconsin

March 12, 2009

Senate Labor, Elections and Urban Affairs Committee
Senator Spencer Coggs
Senator Robert Wirch
Senator John Lehman
Senator Alan Lasee
Senator Glenn Grothman

As in years past, we are asking our State Legislators to pass the Equal Pay Enforcement Act. As members of the Wisconsin Federation of Business & Professional Women we understand the importance of pay equity in the lives of women, families, and businesses of Wisconsin.

Pay discrimination still exists. It exists for women, minorities, and older workers. The national gap for women and minorities is at $.778 to a man's dollar, only a slight improvement over last year. Over the last seven years little change has occurred in the gap. In Wisconsin the gap is $.70 based on a 4-year degree. While we acknowledge that part of the gap is attributed to differences in education, experience and time in the work force that does not account for all of it.

Undervaluing the work women do, limiting the opportunities for advancement and the perks given is related to the existing stereotypes about what kind of work is appropriate for women and the importance of their jobs. When parking lot attendants are paid more than childcare workers, we know that the work women do is undervalued. If women and men have different jobs in a company, women may not be choosing the lower paying jobs. They may have trouble advancing in a company due to bias about women's abilities or levels of commitment.

Pay inequity is across the board. It can be found in all careers and in all income levels. According the US Census, among workers with high school diplomas, women received $24,253 in comparison to the $40,706in the median annual income earned by men. Among workers with a bachelor's degree, women's median annual income level was $39,865 to the men's $53,108.

The wage disparity also grows as women get older. Ultimately, women in the workforce will receive $8000 less annually in retirement income than their male counterparts. It is no surprise that elderly women comprise a large portion of those living in poverty. In a country and state such as ours, that is a disgrace.

We need to start working at the elimination of pay inequity. The Equal Pay Enforcement Act is a step in the right direction to accomplish this. It puts teeth behind the current labor laws in existence and holds employers accountable for their actions. If companies are being fair in their employment actions, they have nothing to fear.

We are not asking for special consideration, just an even playing field. We encourage you to support Bill SB20, The Equal Pay Enforcement Act and pass it out of committee and to the Senate floor for a vote.

Thank you for your time and consideration.

Lin Clousing
BPW/WI Legislative Chair

Cc: Senator Dave Hansen
Representative Christine Sinicki

Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

Phone • (608) 257-9521
Fax • (608) 283-1709

Gary L. Antoniewicz
Direct Dial Number • (608) 283-1759
gantoni@boardmanlawfirm.com

BOARDMAN LLP
LAW · FIRM

March 11, 2009

Senator Spencer Coggs
Senate Committee on Labor, Elections
and Urban Affairs
123 South
Wisconsin State Capitol
Madison, Wisconsin

Re: Opposition to Senate Bill 20 re: authorizing the circuit court to order a person who engages in discrimination in employment to pay compensatory and punitive damages and a surcharge and making an appropriation

Dear Senator Coggs and Members of the Committee:

I am writing on behalf of the Midwest Equipment Dealers Association, Inc. ("MEDA") in opposition to Senate Bill 20 which is before your Committee for hearing on March 12, 2009. MEDA is the trade association representing farm, industrial, construction and outdoor power dealers in Wisconsin; and MEDA members for the most part are small family businesses.

While SB 20 may sound good at first blush, MEDA believes it would greatly harm small businesses and also harm a system to prevent and remedy discrimination that is effective and is working. By requiring compensatory and punitive damages in discrimination lawsuits, the bill would make higher stakes for such suits and would be a disincentive to early settlement. Further, the higher stakes would put the viability of many small businesses at risk. Unlike under federal law, the bill provides no caps on the amount of compensatory and punitive damages available.

Having no caps on damages, many lawsuits now brought in federal court would be shifted to state courts creating a greater burden on our state court system. MEDA believes this bill would have numerous adverse consequences to MEDA members and the state in general.

MEDA is a member of the Conference of Retail Associations which we believe has submitted a more detailed analysis and MEDA joins in this analysis. We ask that the Committee carefully review and reject SB 20.

Thank you for the opportunity to make our views known.

Sincerely,

Boardman, Suhr, Curry & Field LLP
By Gary L. Antoniewicz

Gary L. Antoniewicz

GLA/jmc
cc: Gary Manke

WISCONSIN
COUNTIES
ASSOCIATION

22 EAST MIFFLIN STREET, SUITE 900
MADISON, WI 53703
TOLL FREE: 1.866.404.2700
PHONE: 608.663.7188
FAX: 608.663.7189
www.wicounties.org

MEMORANDUM

TO: Honorable Members of the Senate Committee on Labor, Elections and Urban Affairs

FROM: David Callender, Legislative Associate DC

DATE: March 12, 2009

SUBJECT: Opposition for Senate Bill 20

The Wisconsin Counties Association (WCA) opposes Senate Bill 20 (SB20). While WCA has a long record of support for fair hiring and employment practices, we have identified a number of troubling questions in this proposal which must be resolved:

1. Federal law already provides a judicial remedy for most cases of discrimination under the Wisconsin Fair Employment Act (except in cases where state law offers protections where federal law is silent or less restrictive, such as in sexual orientation or Wisconsin's own FMLA). This proposal would give claimants an avenue of relief in all discrimination cases that is much more relaxed than the federal court standards, which are designed to ensure a fair and full vetting of cases. Is this additional avenue of relief actually needed except in these limited cases where there is no federal language?

2. The bill uses the word "shall" in the context of punitive damages. Would this impact the typical standard for the award of punitive damages in other sections of the Statutes?

3. What is the preclusive effect of a finding of discrimination at the Department of Workforce Development administrative hearing, as the bill requires that a court independently "find" discrimination?

Under current law, if there is a finding of fact of one tribunal, that finding of fact is binding on another tribunal if the burden of proof is the same or heightened in the original tribunal.

For example, if an individual is found to have been driving while intoxicated in a criminal proceeding (where the burden of proof is beyond a reasonable doubt), that person cannot contest a finding that he was driving while intoxicated in a civil proceeding (where the burden is simply the preponderance of evidence). This change is extremely bothersome because any extenuating

circumstances relating to the charge would have already been litigated and, potentially, would never be heard in the context of the "damages enhancement" hearing.

4. Under Wis. Stats. 893.80(4), municipalities are exempt from punitive damage awards. This bill does not say whether those limitations would continue to apply. In fact, one of the exceptions to 893.80(4) in the context of notice of claim and damage cap limitations is in the case of DWD/Equal Rights Division claims. Does the committee want to open the door to punitive damage claims assessed against municipalities?

These issues are significant and could have a negative impact upon counties. WCA respectfully urges the committee to address these questions, and, most significantly, to maintain the current exemption of municipalities from punitive damages.

Thank you for considering our comments. Please contact me if you have any questions.

WMC
WISCONSIN'S BUSINESS VOICE

TO: Members of the Senate Committee on Labor, Elections and Urban Affairs

FROM: John Metcalf, Director, Human Resources Policy

DATE: March 12, 2009

RE: Senate Bill 20 – Cause of Action in Court and Compensatory and Punitive Damages for WFEA Cases

Background
Under the current Wisconsin Fair Employment law (WFEA), if the Department of Workforce Development (DWD) finds that a person has refused to hire an individual, terminated an individual's employment, or discriminated against an individual in promotion, in compensation, or in terms, conditions, or privileges of employment on the basis of the individual's age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest or conviction record, membership in the national guard or military reserves, or use or nonuse of a lawful product during nonwork hours, DWD may order the person to reinstate the employee, provide back pay for not more than two years before the filing of the complaint, and pay costs and attorney fees. Current law, however, does not authorize DWD to order the payment of compensatory or punitive damages or any other surcharges or penalties in a case of employment discrimination.

Provisions of SB 20
SB 20 permits DWD or a person who has been discriminated against in promotion, in compensation, or in the terms, conditions, or privileges of employment on the basis of the various WFEA protected classes to bring action in circuit court, after the conclusion of administrative review by DWD, and judicial review of that proceeding, to recover damages caused by the act of discrimination.

Under the bill, if the circuit court finds that a defendant has committed such an act of discrimination, the circuit court must order the defendant to pay to the person discriminated against compensatory and punitive damages in an amount that the circuit court finds appropriate and to pay to the circuit court an assessment equal to 10 percent of the amount of compensatory and punitive damages ordered. Assessments collected under the bill must be transmitted to the state treasurer, deposited in the general fund, and credited to an appropriation account of DWD, which must use those assessments for the administration of the WFEA.

WMC Position
By allowing unlimited compensatory and punitive damages for violations of the WFEA, through a cumbersome administrative and judicial process, this legislation would have a strong negative impact on the Wisconsin business climate. Further, these proposed changes would come at a time when the Wisconsin economy and many businesses face unprecedented economic challenges. Finally, the surcharge feature of this legislation creates an incentive for DWD to take employment discrimination claims to circuit court to fund agency operations.

Conclusion
For these reasons, WMC urges the Committee to vote against this legislation.

501 East Washington Avenue Madison, WI 53703-2944 P.O. Box 352 Madison, WI 53701-0352
Phone (608) 258-3400 • **Fax** (608) 258-3413 • www.wmc.org

Wisconsin Retail Associations Working Together

Midwest Equipment Dealers Association

Midwest Hardware Association

National Federation of Independent Business

Outdoor Advertising Association of Wisconsin

Wisconsin Automobile & Truck Dealers Association

Wisconsin Automotive Aftermarket Association

Wisconsin Automotive Parts Association

Wisconsin Grocers Association

Wisconsin Merchants Federation

Wisconsin Petroleum Marketers & Convenience Store Association

Wisconsin Restaurant Association

CONFERENCE of RETAIL ASSOCIATIONS

TO: Senate Committee on Labor, Elections and Urban Affairs

DATE: March 12, 2009

RE: **Senate Bill 20 – Committee hearing on March 12, 2009**

POSITION: Oppose

The Conference of Retail Associations ("CORA") has deep concerns about the impact of Senate Bill 20 on small businesses and the equal rights process in Wisconsin. SB 20 adds unlimited compensatory and punitive damages to the remedies available under the Wisconsin Fair Employment Act ("WFEA"). It provides that litigants who are successful in pursuing discrimination claims before the Equal Rights Division ("ERD") will be entitled to a second trial in circuit court on the issue of compensatory (pain and suffering) and punitive damages.

CORA members believe that the bill will have severe financial impact on small businesses, will inhibit mediation and settlement of claims, and will clog the circuit courts with new cases as well as cases presently brought under federal law in the federal courts. SB 20 will have unintended effects on employees, businesses, and the courts.

Wisconsin Fair Employment Act (WFEA)

The WFEA serves a valuable purpose for both Wisconsin employers and employees. The WFEA provides an administrative process designed to be a simple alternative to protracted litigation, a system that permits litigants an opportunity to have their cases reviewed and determined even if they have no legal representation. The ERD investigates and mediates complaints and employs administrative law judges who hold hearings and, if discrimination is found, can award remedies, which include reinstatement, back pay, and attorneys' fees. These are reasonable and significant remedies designed to compensate employees without bankrupting small business.

Equal Employment Opportunity Commission (EEOC)

Wisconsin employers who employ more than 15 employees are also covered by federal laws including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act which are administered by the federal EEOC. The EEOC has an administrative process similar to the WFEA and has shared jurisdiction with the state. Under federal law, however, employees are already permitted to sue in federal court for compensatory and punitive damages. **Unlike the proposal in SB 20, however, federal law places a cap on the amount of compensatory and punitive damages an employee may receive, and the cap varies based upon the size of the business in order to protect small businesses from the enormous risk involved. The following limits are imposed under federal law for compensatory and punitive damages:**

$50,000 if under 101 employees

$100,000 if 101 to 200 employees

$200,000 if 201 to 500 employees

$300,000 if over 501 employees

No compensatory or punitive damages are permitted for businesses under 15 employees who are not currently covered by the federal laws.

CONCERNS WITH SB 20

CORA's concerns with SB 20 include:

- SB 20 will complicate procedures under the WFEA by adding a second trial over the issue of damages after the ERD hearing.
- SB 20 will encourage more employers to appeal adverse ERD decisions to avoid damage claims.
- Both employees and employers will face greater costs of protracted litigation as the stakes are raised.
- Employees will have less incentive to mediate and resolve issues early with the prospect of unlimited compensatory and punitive damages.
- Even the smallest of Wisconsin's businesses will be faced with unlimited damage exposure which amounts could bankrupt businesses.
- SB 20 makes compensatory and punitive damages mandatory.

- SB 20 creates a conflict of interest for ERD by providing the state a stake (10 percent surcharge on damages) if discrimination is found.
- By not limiting damages for state claims, lawsuits currently filed in federal court will now be filed in circuit courts.
- The increase of new cases together with the cases now filed in federal court will cause an enormous burden on already underfunded state courts.
- The surcharge provided for in SB 20 increases the cost on defendants and encourages more litigation.

CONCLUSION

While appearing to address laudable goals, SB 20 will have tremendous consequences, some of them unintended. SB 20 will upset the current balance in the WFEA procedures and relationship to federal law. SB 20 will raise the stakes, encourage protracted litigation, and burden employers with exposure to unlimited jury awards.

WISCONSIN ASSOCIATION *for* JUSTICE

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WAUSAU

JANE E. GARROTT
EXECUTIVE DIRECTOR

Testimony of Paul A. Kinne
on behalf of the
Wisconsin Association for Justice
before the
Senate Labor, Elections & Urban Affairs Committee
Sen. Spencer Coggs, Chair
on
2009 Senate Bill 20
March 12, 2009

Good afternoon, Senator Coggs and members of the Committee. My name is Paul A. Kinne. I am a member in the law firm of Gingras, Cates & Luebke, Madison, Wisconsin. I am a member of the Wisconsin Association for Justice (WAJ) and serve as Co-Chair of the Employment Law and Civil Rights Committee. I appear on behalf of WAJ in favor of SB 20. Thank you for this opportunity to testify.

Discrimination is a pervasive problem in society. Numerous complaints are filed each year in Wisconsin alleging discrimination on the basis of race, sex, religion, national origin, physical disability, age and sexual orientation. Discriminatory practices include bias in hiring, promotion, job assignment, termination, compensation, and various types of harassment.

The main body of employment discrimination laws is composed of federal and state statutes. The United States Constitution and some state constitutions provide additional protection where the employer is a governmental body or the government has taken significant steps to foster the discriminatory practice of the employer. Discrimination in the private sector is not directly constrained by the Constitution, but has become subject to a growing body of federal and state statutes.

Under federal anti-discrimination statutes, a person alleging discrimination is entitled to compensatory and punitive damages. A complaint is filed with the Equal Opportunity Employment Commission (EEOC), which interprets and enforces the Equal Payment Act, Age Discrimination in Employment Act, Title VII, Americans With Disabilities Act, and sections of the Rehabilitation Act. These federal laws, however, only apply to employers with 15 or more employees.

After an investigation, the EEOC issues a notice of right to sue. This is an expensive and time-consuming proposition because the lawsuit must be brought in federal court.

The State of Wisconsin and the EEOC have concurrent jurisdiction in the investigation of discrimination complaints. In other words, the responsibility for investigating discrimination complaints is shared between the state and federal agencies. An employee can file suit in either state court or federal court to enforce his or her rights under the federal statutes. However, an employee is limited exclusively to an administrative hearing to assert his or her rights that arise under the state law that prohibits discrimination, retaliation and harassment.

Current state remedies for discrimination are very limited, which is why passage of SB 20 is very important. Right now a person alleging discrimination can only recover damages for lost wages and the right to be reinstated in the job. The claim for lost wage damages maybe very little because it is reduced by wages earned in a new job. In other

words, if a person is earning $8 an hour and leaves because of discrimination and then finds a new job for $6 an hour, he or she can only recover the $2 an hour lost.

There are other gaps left between the federal and state law. For example, federal law offers no protection from discrimination on account of sexual orientation, regardless of the number of people employed by a business. A victim of sexual orientation discrimination, then, cannot recover damages done to his or her career resulting from a termination, nor can he or she be compensated for the emotional harm caused by the employer's unlawful acts. Passage of this law would provide an aggrieved employee the opportunity to recover those kind of damages.

In addition, Wisconsin has no provision for providing damages if people have not lost their jobs, but are working in a "hostile work environment." Why should people lose their job before they can bring a claim for discrimination in Wisconsin?

I am presently working on a case in which the employer employed fewer than 15 employees. The company had no policy prohibiting sexual harassment. One of the co-owners of the company sent sexually charged text messages and propositioned my client. She complained to the other co-owner, who promised to take action. When the harassment did not end, my client complained again. This time, the other co-owner fired her.

She was a part time employee, so the amount of back wage loss damages she can recover are minimal. The real damages in this case are emotional: during a portion of her employment, her husband had been serving in Iraq, and she was left here to take care of and support their children. To have one of her bosses proposition her and ask her questions about her sex life made a bad situation even worse. But my client is left without a means to be compensated for this harm.

Limited damages make it very difficult to bring discrimination cases. Attorneys turn down dozens of cases because damages are limited and most people cannot afford to pay an hourly fee.

Although the Wisconsin Association for Justice supports the legislation, it has some procedural quirks. For example, as it reads, an aggrieved employee would not have recourse to damages for emotional distress unless the employer appealed an unfavorable finding in the Equal Rights Division. That creates an absurd result.

It is also somewhat confusing as to whether damages would be awarded as part of the circuit court's current authority to review Labor and Industry Review Commission decisions, or in a separate proceeding after circuit court review is complete. Finally, this would all take a lot of time. The best approach would simply allow an employee to bring a discrimination case against any employer directly into circuit court (or the agency, if the employee prefers). But this legislation is certainly a step in the right direction.

Employers know the penalties for discrimination are very low in Wisconsin and that they can engage in discriminatory practices without being held accountable. This thwarts the purpose of the Wisconsin Fair Employment Act, which was designed to eliminate discrimination and harassment based on a person's membership in one of the protected classes set forth in the statute. Passage of SB 20 sends a very important message to employers that Wisconsin will no longer tolerate discrimination in the workplace.

Thank you for this opportunity to testify.

NFIB
The Voice of Small Business®

Wisconsin

Statement Before the Senate Committee on Labor, Elections and Urban Affairs

By

Bill G. Smith
State Director
National Federation of Independent Business
Wisconsin Chapter

Thursday, March 12, 2009
Senate Bill 20

Mr. Chairman, members of the Committee, I appreciate this opportunity to make a brief statement on behalf of NFIB's 12,000 members located across the state of Wisconsin.

Earlier this week, NFIB's Research Foundation released the results of the NFIB's monthly small business economic report. The optimism index of our small business owners has fallen once again for the third consecutive month – to a new level, the second lowest level in the 35 year history of the survey study.

However, there was some encouraging news – 10% of the small business owners said they were planning to reduce employment (down from 14% in January); 13% said they were planning to create new jobs (up from 9% in January). But, make no mistake, these are still the lowest readings aside from the deep recessions in the early 1980's and 1970's.

I mentioned this data because it is important that members of this committee understand the economic struggles on Main Street, and whether Senate Bill 20 would help promote job creation and job growth, or would Senate Bill 20 contribute further to the current economic hardship being experienced by our small business community.

As a result of expanding the incentive to file lawsuits against employers, Senate Bill 20 would clearly also expand job growth, but mainly for the legal community – not the small business community.

Even under current law, nearly 50% of the respondents to a small business liability study fear they will become defendants in a lawsuit, according to the NFIB Research Foundation.

This fear of becoming involved in a lawsuit causes over 20 percent of the small business owners in the NFIB's Liability Study to report they spend more time on liability problems and potential liability problems than such vital business activities as: introducing new technologies or processes, evaluating changes in employee wages and benefits, obtaining or repaying business loans, evaluating the competition, or looking for ways to cut costs. These are the activities small employers should be engaged in – rather than spending both time and money on liability insurance and legal fees.

The median time between engagement of a lawyer to handle a dispute, and it's resolution is 4-5 months, and median legal expenses for those who incurred them were between $4,000 and $5,000, 10 percent had legal expenses of $25,000 or more (NFIB Research Foundation Study, Use of Lawyers).

This legislation would essentially allow unlimited punitive and compensatory damages, unlimited back-pay, a 10 percent penalty surcharge for the Department of Workforce Development, and unlike federal law, which includes a small business exemption and tiering of penalties, Senate Bill 20 would apply to all employers large and small.

I urge members of the committee to reject Senate Bill 20, not because any of us approve of discrimination of any kind in the workplace, but Senate Bill 20 should be rejected because the penalties for employment discrimination under current law are effective, and the unreasonably harsh penalties created by Senate Bill 20 will put in place incentives that will have a severe and costly impact on small business.

Thank you, Mr. Chairman.

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

TO: Members, Senate Committee on Labor, Elections, and Urban Affairs

FROM: Andrew Cook on behalf of the Wisconsin Civil Justice Council

RE: Opposition to Senate Bill 20

DATE: March 12, 2009

The Wisconsin Civil Justice Council (WCJC) represents Wisconsin business interests on civil justice issues before the Legislature. The WCJC's primary goal is to achieve fairness and equity, reduce costs, and enhance Wisconsin's image as a place to live and work. WCJC opposes Senate Bill 20 because of the negative effect it would have on Wisconsin's business climate, especially during this economic downturn.

WCJC is particularly concerned with Senate Bill 20's provision adding *unlimited* punitive and compensatory damages. Moreover, WCJC is concerned that Senate Bill 20 fails to require that the plaintiff prove some sort of intent by the defendant before seeking compensatory and punitive damages.

By adding no limitations on the amount of compensatory and punitive damages, Senate Bill 20 creates an incentive for plaintiffs to file lawsuits as a means to extract money from a defendant in some cases where no discrimination has occurred. Unlike Senate Bill 20, federal employment discrimination law places limitations on punitive damages, ranging from $50,000 to $300,000, depending on the size of the employer.[1] Although WCJC opposes *any* compensatory or punitive damages under this law, it is extremely concerned about the potential for lawsuit abuse—especially without any caps on damages. In addition, WCJC opposes a 10 percent "surcharge" on top of the unlimited compensatory and punitive damages that would be used by the Department of Workforce Development (DWD) towards administering the fair employment law. This provision creates the unintended consequence of giving DWD the incentive to alter its decisions in order to increase its budget.

Furthermore, WCJC is concerned that Senate Bill 20 fails to require any showing by the plaintiff that the employer acted with malice or recklessness. Under federal law, the plaintiff must prove that the defendant "engaged in a discriminatory practice" with "malice or reckless indifference to the federally protected rights of an aggrieved individual" in order to receive punitive damages.[2] Similarly, *Black's Law Dictionary* defines "punitive damages" as "[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit." Senate Bill 20 would allow punitive damages without making any such finding. As such, Senate Bill 20 provides an employer little to no protection against an aggrieved employee filing a baseless lawsuit with the hope of receiving damages—even if there is no proof the employer had intent to discriminate against the employee.

In conclusion, Senate Bill 20 imposes unlimited compensatory and punitive damages and fails to require that the plaintiff prove that the defendant acted with malice or recklessness—the prerequisite for punitive damages. Therefore, WCJC respectfully requests that you oppose recommending passage of Senate Bill 20.

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[1] 42 U.S.C. § 1981a(b)(3).
[2] 42 U.S.C. § 1981a(b)(1).

Individual Rights & Responsibilities Section

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TESTIMONY OF THE INDIVIDUAL RIGHTS AND

RESPONSIBILITIES SECTION OF THE STATE BAR OF WISCONSIN

REGARDING SENATE BILL 20

Before the Senate Committee on Labor, Elections, and Urban Affairs

March 12, 2009

Members of the committee:

Thank you for allowing me to speak today. I am here to testify as the current Chair of the Individual Rights and Responsibilities Section Board; the Section is comprised of State Bar of Wisconsin members who have a particular interest in civil and constitutional rights. I am also here to testify on behalf of the individual plaintiffs I have represented in the area of employment discrimination.

I want to particularly thank those of you who have offered this proposed legislation. The goal of the legislation – to provide compensatory and punitive damages for individuals who have been targeted by their employers for illegal discrimination – is a laudable one. Compensatory damages are especially necessary for individuals who have been targeted for harassment on a basis protected under Wisconsin's Fair Employment Act. For example, an individual who is harassed on the basis of his or her sexual orientation by being called a "faggot" or a "dyke" likely feels just as harmed as an African-American person feels who is called the "n" word. However, for gay men or lesbians, there is no way to claim damages for the mental injury or to require an employer to pay for psychiatric or psychological treatment for the harm. Senate Bill 20 is an attempt to remedy this problem. Thank you.

With that said, there are two problems with the bill as it is currently drafted. First, the bill provides for a system of administrative exhaustion that is long and cumbersome. Second, the language of the bill is, in many places, ambiguous. These two factors defeat the purposes the bill is trying to achieve.

State Bar of Wisconsin
5302 Eastpark Blvd. ◆ P.O. Box 7158 ◆ Madison, WI 53707-7158
(800)728-7788 ◆ (608)257-3838 ◆ Fax (608)257-5502
Internet: www.wisbar.org ◆ Email: service@wisbar.org

1. Administrative exhaustion – the road is long and hard.

Looking at the first sentence of the proposed s. 111.397(2), it states:

> A person discriminated against or the department may bring an action in circuit court against an employer, labor organization, employment agency, or licensing agency to recover damages caused by a violation of s. 111.321 after the completion of an administrative proceeding, including judicial review, concerning that violation.

The current system allows an individual to file his or her complaint with the Equal Rights Division, after which there is an investigation. If the investigator determines that there is probable cause to believe that discrimination occurred, then the matter is referred to an Administrative Law Judge to hear the case on the merits and determine whether, in fact, the employer engaged in illegal discrimination. A hearing is held, a decision is made, and that decision may be appealed to the Labor and Industry Review Commission. After the Commission renders its decision, then the matter may be appealed to a circuit court on a petition for review under Chapter 227, after which it may be further appealed to the Court of Appeals and the Wisconsin Supreme Court.

The way the statute is written, it is only after this entire process is complete that a person discriminated against may take his or her case into court. As a practical matter, by the time the case returns to circuit court, it has been years since the initial employment discrimination. Witnesses have disappeared, damages have mounted, and the case has dragged on without payment to the employee to make him or her whole for the harm endured.

2. Ambiguity – what does that language mean, anyway?

I want to make this point: if the language of the bill remains ambiguous, attorneys will fight for years over what the legislation means, rather than dealing with cases on the merits. Attorney who represent *employees* want to litigate over whether an employer illegally discriminated against those employees, not whether a particular procedure was properly followed. However, delay is an employer's best weapon, and it is frequently used to defeat employment discrimination cases.

Looking at the second sentence of the proposed s. 111.397(1), it states:

> If the circuit court finds that a defendant has committed a violation of s. 111.321, the circuit court shall order the defendant to pay to the person

> discriminated against compensatory and punitive damages in an amount that the circuit court finds appropriate …

Does this language mean that the circuit court makes a new determination, *after* the administrative law judge, the Labor and Industry Review Commission, the circuit court *and* the appellate courts, as to whether an employer has engaged in illegal discrimination? In the alternative, does this mean that the circuit court merely rubber-stamps the earlier decisions regarding liability, but makes a new decision as to compensatory and punitive damages? Does this mean that there is a trial to the circuit court on the issues of compensatory and punitive damages alone? Or does this language mean that the case must be re-tried in its entirety? Finally, does this mean that the case can be tried to a jury?

If the language can be argued to have more than one potential meaning, it is ambiguous. It is a waste of judicial resources to have courts determine the meaning of legislation; the government and its citizens are better served if legislative intent is clear in the language of the legislation.

I can tell you that employee advocates want the opportunity to try these cases to a jury. There may be instances, however, where it is in the best interests of our clients to try the cases to an Administrative Law Judge. For example, if the employee claims that he or she has been discriminated against on the basis of his or her criminal record, perhaps such a case would be better brought in an administrative forum rather than in a court in front of a jury which might be unsympathetic to such claims.

I have attached a flow chart which shows what I anticipate would be the best structure for allowing a private cause of action which would allow for compensatory and punitive damages. As you will note, the employee would have two different times when he or she could divert her case into court. In some instances, it may make sense to file in court immediately; in most instances, employees will want the opportunity for completion of the Equal Rights Division's investigation process before filing in court.

3. More ambiguity – when do I file?

The proposed language reads:

An action under sub. (1) shall be commenced within the later of following periods, or be barred:

(a) Within 60 days after the completion of an administrative proceeding, including judicial review, concerning the violation.
(b) Within 2 years after the violation occurred, or the department or person discriminated against should have reasonably known that the violation occurred.

I think subsection (a) means after the judicial review *and the period for appeal has run*, but I am not sure. Does it mean 60 days after the opinion on judicial review is filed? What about situations where an appeal to the court of appeals is filed 90 days after the decision at the circuit court? Does that stay the claim for compensatory and punitive damages in circuit court?

As for subsection (b), does this mean that if the case is still pending after two and one-half years, then the only option for filing for judicial review is under subsection (a)?

I can think of no reason that the legislature would want to include ambiguous language in legislation, as it simply clogs the court system with cases which do not go to the merits. It would be nice, perhaps, if a judge could come to the Capitol and just ask "what *did* you mean by this?" The problem is, the judge might get several different ideas; after all, if the judge is unsure, so probably were the drafters. Be direct – say what you mean. We will all be better off.

4. The surcharge – why us?

Senate Bill 20 contains a provision for a surcharge, which I suppose might encourage defendants to settle cases prior to a final decision by the court. However, we do not understand why our clients, who have already been discriminated against by their employers, should be treated differently by the court system. Granted, the surcharge is to be paid by the employer, but it still seems odd that these cases would be treated differently than other litigation.

5. There are other ways to achieve the same ends.

The IRR Board has not proposed specific language as an alternative to the proposed language but has, instead, suggested that the 1991 Senate Bill 1 be used as a model. The 1991 SB 1 would have created a private cause of action that went beyond the Wisconsin Fair Employment Act. Even if you decide that you simply want to amend the Wisconsin Fair Employment Act, I suggest you look to that bill for language that is simple, straightforward and unambiguous.

Other models for private causes of action under Wisconsin law are contained in Wisconsin's Public Accommodations law, Wisconsin's Open Housing law and Wisconsin's Wage Claim law. They all differ slightly, but they all allow an individual to bring her case to court.

CONCLUSION

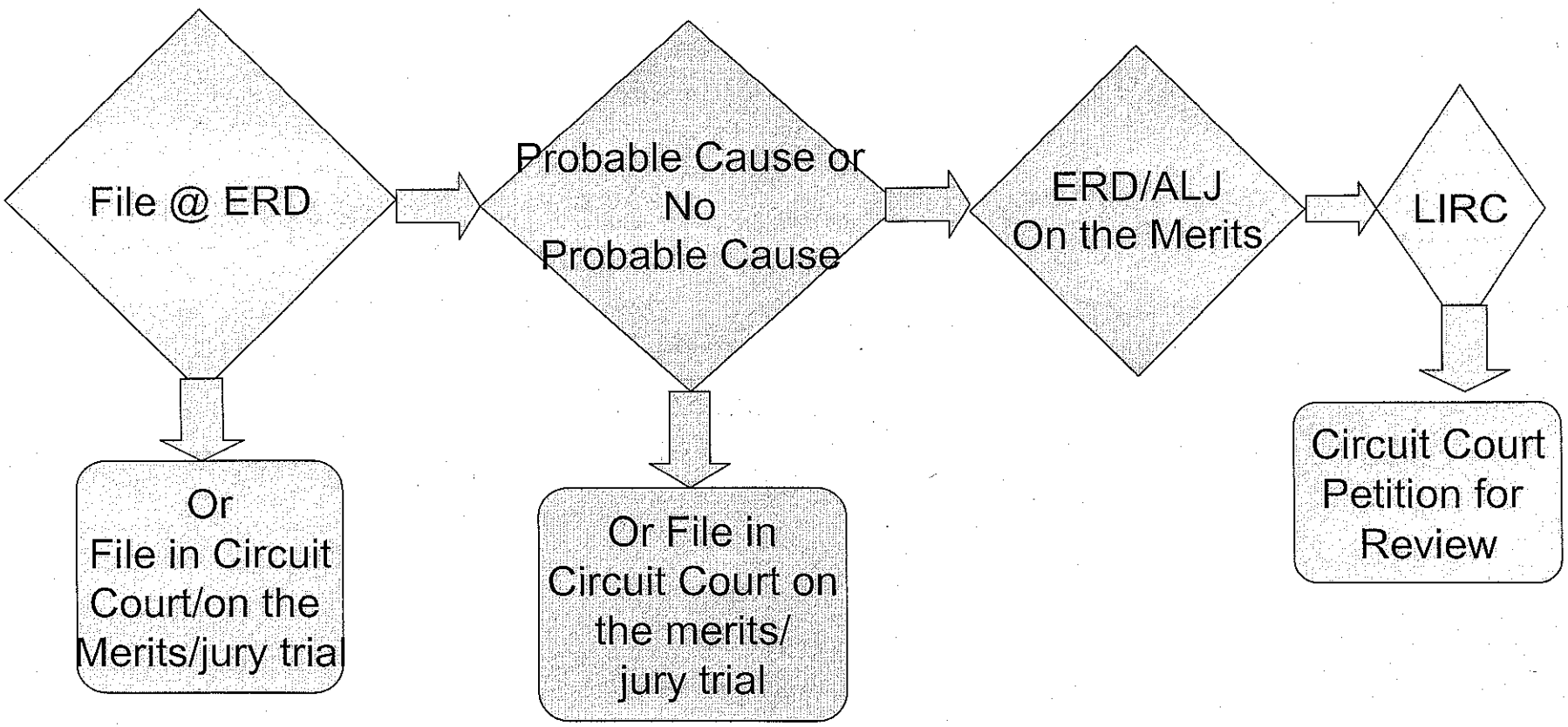
I thank you again for the opportunity to speak today. I would like to underscore the points I made at the outset. The IRR Section Board supports the goals of this legislation, but the

language as it is currently drafted contains an unnecessarily long and arduous administrative exhaustion provision, and the language of the entire bill is ambiguous. The result of the bill as drafted will be to give clients relief that they have not had before, but only after an inordinate investment in time and resources. I urge you to keep in mind the goals of this legislation, but find a different way to craft the language so that the citizens of Wisconsin are better served by your efforts.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone. If you have questions about this memorandum, please contact Adam Korbitz, Government Relations Coordinator, at akorbitz@wisbar.org or (608) 250-6140.

Suggested Private Right of Action



1991 SENATE BILL 1

January 15, 1991 - Introduced by Senators FEINGOLD, BURKE, CZARNEZKI, ULICHNY and CHVALA; cosponsored by Representatives M. COGGS, GRUSZYNSKI, FORTIS, NOTESTEIN, LAUTENSCHLAGER, BOCK, CARPENTER, MOORE, SEERY, ROHAN and YOUNG. Referred to Committee on Judiciary and Consumer Affairs.

AN ACT to create 893.875 and 895.68 of the statutes, relating to creating a private cause of action for certain civil rights violations.

Analysis by the Legislative Reference Bureau

This bill creates a private right of action for certain civil rights violations. Under this bill, an aggrieved person may bring an action in circuit court against any other person, including the state, that injures the aggrieved person or causes the aggrieved person to be injured by violating the state laws prohibiting discrimination in employment or violating the civil rights guarantees in the state constitution. An aggrieved person may bring this action in addition to or in lieu of obtaining any other available remedy. The court may award a prevailing plaintiff any appropriate relief, including injunctive relief, compensatory damages, punitive damages and reasonable attorney fees.

For further information see the local fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 893.875 of the statutes is created to read:

893.875 CIVIL RIGHTS ACTION. An action under s. 895.68 shall be brought within 6 years after the injury occurred or be barred.

SECTION 2. 895.68 of the statutes is created to read:

895.68 CIVIL RIGHTS ACTION. (1) In lieu of or in addition to obtaining any remedy available under any other law or the constitution of this state, an aggrieved person may bring an action in circuit court against any other person, including the state, that injures the aggrieved

person, or causes the aggrieved person to be injured, by violating article I of the constitution or subch. II of ch. 111.

(2) In an action under sub. (1), a court may award a prevailing plaintiff any appropriate equitable remedy or legal remedy or both, including injunctive relief, compensatory damages, punitive damages and reasonable attorney fees.

(End)